IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1399

Kentucky Central Life Insurance Co.,
A Kentucky Corporation,
Petitioner

v.

Leslie Karen Myers, Individually and
as next friend for Michael Myers,
a minor, a citizen of Texas,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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May 6, 1975

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Kentucky Central Life Insurance Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit 506 F.2d 1054 filed in the above entitled case on January 6, 1975, and the order overruling the Petition for Rehearing entered on February 6, 1975, 508 F.2d 842.

OPINIONS BELOW

The District Court Opinion is included herein in Appendix A, infra. This Opinion is reported at —— F. Supp. —— (W.D. Tex., 1974). The Fifth Circuit Opinion is included herein in Appendix A, infra, and is reported at 508 F.2d 842.

JURISDICTION

The judgment of the Fifth Circuit was filed on January 6, 1975. A timely Petition for Rehearing was overruled on February 6, 1975. The jurisdiction of this Court is invoked under 28 USC § 1254 (1). The basis of jurisdiction in the District Court was 28 USC § 1332 (a).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in apparently holding that the mere deposit of checks, which are subsequently dishonored, coupled with internal accounting practices, constitutes unconditional acceptance of such checks as payment of insurance policy premiums when the contract between the parties expressly provides otherwise?

2. Did the Court of Appeals err in apparently

holding that an insurance company is estopped to assert the lapse of a policy upon dishonor of monthly premium checks by failure to inform the policyholder of reversion of the premium paying period to an annual period, when the contracts provide for lapse of the policy, not change in the frequency of payments, upon non-payment of premiums?

LOCAL COURT RULES INVOLVED

Fifth Circuit Local Rule 18:

"Summary Calendar. -- (a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the

summary calendar."

Fifth Circuit Local Rule 21:

"Affirmance Without Opinion -- When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: 'AFFIRMED. See Local Rule 21,' or "ENFORCED. See Local Rule 21.'"

PRELIMINARY STATEMENT

This is an action on a life insurance policy. The questions presented are of the greatest importance to the American public and the entire spectrum of the business and financial community, as well as the insurance industry in the United States.

The facts are undisputed. Kentucky Central Life Insurance Company (Kentucky Central) issued a policy insuring the life of Michael Myers (Myers). The premiums on the policy were payable monthly by pre-authorized check.

The pre-authorized checks for two consecutive premium payments were dishonored by Myer's bank due to "insufficient funds." Inasmuch as Myers failed to replace the dishonored draft as requested by Kentucky Central, the policy lapsed by its own terms prior to Myer's death.

As the District Court recognized, there is no question that under these circumstances Kentucky Central could have cancelled Myer's policy, and that forfeiture of an insurance policy may be, when contractually stipulated,

self-executing upon non-payment of premiums.

The initial question presented, then, is whether despite the essentiality of highly sophisticated data processing and internal accounting processes to the conduct of the Nation's trade and commerce, the use of such processes can result in a liability that would not otherwise exist, when the person asserting such liability is neither cognizant of nor prejudiced by the use of such procedures?

In simpler times in the Nation's past insurance premiums were normally paid in cash, and the insurance company would deliver its executed receipt to the policyholder in exchange for the premium. There is no question that in the instant case the policy would be deemed to lapse if the cash premium were not delivered. Certainly an opposite conclusion should not result from the fact that highly developed data processing and accounting procedures, the Federal Reserve System and the United States Mail make it possible and convenient for citizens of Texas to engage in commerce with citizens of Kentucky.

We respectfully submit that this Court should grant certiorari in this case. The issues involved are of great concern not only to the insurance and banking segments of the financial community directly affected, but to all commercial enterprises, the legal rights and liabilities of which are inexplicably intertwined with interstate banking procedures. The issues are also of paramount concern to the millions of Americans whose financial security is based upon their ability to maintain mutually profitable relationships with financially solid insurance companies of national orientation based in distant states.

STATEMENT

The facts in this case are undisputed. Kentucky Central issued the subject policy on the life of Myers on May 1, 1972. The policy provided for automatic lapse upon non-payment of any premium when due (Appendix B). An endorsement attached to the policy provided that the premiums were to be paid monthly by pre-authorized checks drawn on the bank account of Myers. The

pre-authorized check agreement executed by Myers provided that the use of the pre-authorized check plan would in no way alter or amend the provisions of the policy with respect to the termination of such policy upon non-payment of any premium due. The agreement further provided that no premium would be deemed to have been paid unless and until Kentucky Central received actual payment at its home office, and that the company could terminate the pre-authorized check plan immediately upon the dishonor of any check (Appendix C).

The premium due May 1, 1972, was paid in cash. The pre-authorized check for the premium due June 1, 1972, was paid by the Insured's bank in the due course of business. The pre-authorized checks drawn by Kentucky Central on the bank account of Myers for the premium due July 1, 1972, and August 1, 1972, were dishonored by Myers' bank and were returned to the Kentucky Central offices bearing the notation "insufficient funds."

Kentucky Central notified Myers of the dishonor of the July draft on or about August 9, 1972 (Appendix D).

Kentucky Central never received payment in any form from Myers for the monthly premiums which became due subsequent to June 1, 1972, and did not, therefore, attempt to draw a pre-authorized check for the premium which would have become due September 1, 1972, had the prior premiums been paid.

Myers died September 10, 1972.

Kentucky Central made certain internal accounting entries reflecting the event described above. Upon deposit of each pre-authorized check into its depository bank, the company credited its premium income account and debited its cash account. Each draft was then transmitted through regular banking channels to Myers' bank for payment.

Upon notification of dishonor of the July draft, the company issued its draft to its depository bank in an amount equal to all of the dishonored items received by the bank on that particular date. The company credited its cash account, which had been debited on deposit of the draft, and debited its "returned check clearing

account" (account No. 22050). When the company ascertained that this particular item had been dishonored only once and was eligible for re-deposit in accordance with company policies, the draft was again deposited into the home office bank account, and account No. 22050 (returned check clearing account) was credited and cleared. The July pre-authorized check was again transmitted to the Myers' bank for payment.

The July draft was dishonored by Myers' bank a second time, and again the company credited its cash account and debited its returned check clearing account (account No. 22050). It was then determined that since the draft had been twice dishonored it was not eligible for re-deposit, and Myers was notified. Account No. 22050 was credited and cleared, and a debit entry was made to account No. 22054 (returned check account), an account of dishonored checks.

Prior to the company's knowledge of the second dishonor of the July draft, the August draft was deposited and transmitted in the manner described above. The August

draft was also dishonored twice and handled in the same manner as the July draft. A detailed summary of these transactions is contained in Appendix E.

No draft was drawn for the premium which would have become due September 1, 1972, had the prior drafts been paid.

PROCEEDINGS BEFORE THE DISTRICT COURT

The questions of law which Petitioner now seeks to raise before this Court were first raised in the District Court.

The Respondent instituted suit on the policy and the Petitioner defended on the basis that the policy lapsed due to non-payment of premiums.

The only contested issue of fact in the District Court was whether or not Kentucky Central notified Myers of the dishonor of the July draft. (See Exhibit F, Pre-Trial Order, Paragraph IV.)

This fact issue was abandoned by Respondent at trial, the jury previously demanded by Respondent was waived, and the question of the legal significance of the undisputed facts was submitted to the Trial Court.

Respondent's theory of liability in the

District Court was twofold. It was Respondent's first contention, as Petitioner understands it, that the dishonor of the monthly pre-authorized checks caused reversion of the premium paying period to an annual period, and that Kentucky Central is thus estopped to assert lapse by failure to inform Myers of such reversion and of some amount of partial annual premium then allegedly due.

Respondent's second theory was that ". . . the internal accounting procedures of the defendant effected the payment of the premiums due on or about July 2 and August 2, 1972." (Appendix F, Paragraph VI, infra.)

The District Court did not write on Respondent's first theory of liability, but held that Kentucky Central "accepted" the July and August drafts in payment of the premiums, due to its accounting procedures and treatment of the drafts. (See Appendix A, Opinion, infra.)

PROCEEDINGS BEFORE THE FIFTH CIRCUIT

Pursuant to its Local Rule 18, the Fifth

Circuit declined to hear argument in this case and assigned it to its summary calendar. The Court then affirmed the judgment of the District Court without written opinion pursuant to its Local Rule 21. (See Appendix A, infra.)

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Has Rendered a Decision in Conflict with Applicable State Law.

II.

The Court of Appeals has Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Matter.

III.

The Court of Appeals Has Rendered a Decision Which Will Result in a Burden on Interstate Commerce.

I. The Court of Appeals Has Rendered a Decision in Conflict with Applicable State Law.

Petitioner is not unmindful of the gargantuan caseload of this Court and its awesome responsibility to the Nation in

cases of the gravest national significance. Petitioner is further cognizant of the Court's increasing reluctance to grant certiorari to correct errors of the inferior federal courts in matters of local law. We respectfully submit that this Court should grant certiorari in this case because of the serious effect of the lower Court decisions on the business operation of Petitioner and the entire business community, and because of the summary nature of the appellate review afforded this case in the Fifth Circuit.

It will doubtlessly be argued by Respondent that this Court should not accept this case because no substantial federal question is presented. The crowded dockets of this Court and the Courts of Appeal perhaps suggest a re-examination of the wisdom and necessity of jurisdiction in the federal courts based upon diversity of citizenship. Nonetheless, as long as the diversity jurisdiction constitutes an integral part of the jurisprudence of our federal system, a case and controversy arising under 28 USC § 1332 (a) should be

of the same dignity before this Court as one arising under the laws of the United States.

It is respectfully pointed out that the Petitioner before this Court, Defendant below, did not choose the federal forum for this litigation. Inasmuch as the Respondent, Plaintiff below, chose the federal forum, she should not be heard to complain of thorough and effective federal appellate review on the ground that the case turns on a point of state law.

We have no doubt that had this case been litigated in the Courts of the State of Texas the judgment would have been the opposite of that entered by the U. S. District Court. The Supreme Court of Texas has consistently held that the deposit of a check in the bank for collection does not constitute acceptance of the same in payment for the premium, where payment of the check is afterwards refused by the bank upon which it was drawn. Texas Mutual Life Insurance Ass'n v. Smartt, 114 S.W. 2d 528 (Tex. Sup. Ct. 1938), National Aid Life Ass'n. v. Horne, 155 S.W. 2d 910, (Tex. Sup. Ct. 1941), Texas

Mut. Life Ins. Ass'n. v. Tolbert, 136 S.W. 2d 584 (Tex. Sup. Ct. 1940).

It is further well established in Texas that the internal accounting procedures of an insurance company, unknown to the alleged insured, cannot alter the clear terms of the policy and result in liability where none otherwise exists. See also Southie House v. Grand Lodge, Colored Knights of Phythias of Texas, 48 S.W. 2d 674 (Tex. Civ. App. 1932, no writ hist).

As is readily apparent from an examination of the foregoing authorities, the Supreme Court of Texas has insistently and consistently disregarded such superficialities as the status of the insurer's books on a given date and has focused on the fundamental question of whether or not the premium was, in fact, paid.

The net effect of these accounting transactions in the instant case was to withdraw the amounts previously debited to the home office bank account upon deposit of the dishonored drafts, and to debit these amounts into a suspense account No. 22054. Thus the District Court concluded that at the

time of Myers' death he "owed" the company $29.60. Herein lies the essential fallacy of the District Court's reasoning. The Court's analysis rests upon the tacit premise that there is an obligation on Myers to pay the premium and keep the policy in force. Thus, apparently reasoned the Court, upon the dishonor of the drafts Myers "owed" the company $29.60. Since Myers owed the company the premium, the company owed Myers the proceeds of the policy.

The problem with this analysis is that Myers was under no obligation to pay the premiums and keep the policy in force. He had an option each and every month to either maintain a bank balance sufficient to pay the pre-authorized checks and keep the policy, or to let the pre-authorized checks bounce and lose the policy. Clearly in this instance Myers opted for the latter. Thus it is clearly erroneous to hold that Myers owed $29.60 to the company at the time of his death. There was absolutely no obligation on Myers' part either before or after the dishonor of the checks to pay this sum to Kentucky Central Life Insurance

Company,

Under the reasoning of the District Court the insurance company could have continued to unsuccessfully draft Myers' account for a period of months or even years and then present Myers with a bill for accrued premiums. The District Court further implies that such an obligation could be collected by the company by suit and judgment. It is inconceivable to the Petitioner that this Court, or any Court, would uphold a judgment against Myers or his estate on the theory advanced by the District Court. But the Fifth Circuit's affirmance of the judgment against Kentucky Central must necessarily rest upon the same reasoning.

There is a conceptual contradiction within the opinion of the District Court. At the beginning of page three of the Opinion, the Court presented the problem as follows:

> "Thus, the insurance company clearly could have cancelled Myers' policy. The question is whether Kentucky Central actually did cancel the policy, or if it accepted

> the July and August pre-authorized checks in payment for the premiums for those months."

Apparently, the Court had no problem with the company's right to declare a forfeiture prior to Myers' death. The inquiry, as posed by the Court, appears to be whether the company did cancel the policy.

The Court then recognizes the substantive law of Texas that forfeiture of the benefits of an insurance policy may be, when contractually stipulated, self-executing upon non-payment of premiums. Thus, given the Court's conclusion that the policy could have been forfeited for default in premium payment, and given the self-executing provision in the instant case, the conclusion is inescapable that the policy automatically lapsed upon non-payment of premiums.

The District Court relied on Harris v. Glen Falls Group, 478 S.W. 2d 561 (Tex. Civ. App. Corpus Christi 1972, writ ref'd. n.r.e.); Texas Mut. Life Ins. Ass'n. v. Love, 66 S.W. 2d 424, 426 (Tex. Civ. App. Beaumont 1933, writ dism'd); and Pardee

v. Universal Life Insurance Co., 170 S.W. 2d 852 (Tex. Civ. App., Waco 1943, no writ), for the proposition that retention of the pre-authorized checks constituted acceptance. It is respectfully submitted that the Court's reliance upon the above authorities is misplaced.

Harris v. Glen Falls Group, supra, involved a physical damage casualty policy upon which the premium was to be paid by installment note. The policy contained an unconditional recitation that the property was insured from February 24, 1969, until February 24, 1972. Neither the policy nor the note provided for suspension of coverage upon default of the Insured in payments upon the promissory note. The Court refused to read a limitation of liability into the policy and held that the property was insured as recited in the policy. Compare Jefferson Standard Life Ins. Co. v. Hicks, 264 S.W. 1033 (Tex. Civ. App., Beaumont 1924, writ dism'd).

The decision in Texas Mut. Life Ass'n. v. Love, supra, is also inapplicable to the case at bar. In the Love case the insur-

ance company received a personal check executed by the Decedent or his wife for the payment of the assessment due on the policy. The check was subsequently dishonored, and the insurance company retained the check, rather than returning it to the Decedent. The Court held that by retention of the check the company had accepted it as payment.

There are crucial distinctions between Love and the instant case. The Court noted in Love that there was nothing in the notice, the policy, nor the by-laws to the effect that a dishonored check would operate as a forfeiture of the policy. The Court noted with approval the statement made in Northwestern Life Assur. Co. v. Sturdivant, 24 Tex. Civ. App. 331, 59 S.W. 61, 62, that it would be incumbent on the company, if it desired to retain its right under the contract to forfeit the policy, to stipulate that the check would be without effect upon the contract, unless paid in due course. Compare Commonwealth Casualty & Ins. Co. v. Stephens, 150 S.W. 2d (Tex. Civ. App., Waco 1941, no writ).

The Respondent's reliance on Pardee v. Universal Life Insurance Co., 170 S.W. 2d 852 (Tex. Civ. App., Waco 1943, no writ), is also misplaced. The Pardee case was decided adversely to the Plaintiff on the basis of fraud, and the Court expressly declined to pass on whether the insurer's agent was authorized to unconditionally accept the beneficiary's check in payment of the premium. The Court's dicta with respect to the effect of payment of premiums by dishonored draft is conditioned upon the insurer's acceptance of payment on that basis and the absence of contractual stipulations to the contrary. Compare Humphries v. Colorado Life Co., 170 S.W. 2d 315 (Tex. Civ. App., El Paso, 1942, writ ref'd.).

II. The Court of Appeals has Rendered a Decision in Conflict with the Decision of Another Court of Appeals on the Same Matter.

The judgment below conflicts with a decision reached by the Court of Appeals for the Ninth Circuit, and conflicts in principle with a decision of another panel of the Fifth Circuit.

The District Court apparently based its imposition of liability in whole or in part on the fact that the company re-depositied the August draft for collection after its issuance of the August 9, 1972, notice to Myers.

It was the company's standard practice to re-deposit an insufficient funds draft one time. The July draft was re-deposited once after its initial dishonor. The August draft was initially deposited on August 2, 1972, prior to the Company's knowledge on August 7, 1972, of the second dishonor of the July draft. Thus on August 9, 1972, the Company knew that the July draft had been twice dishonored, and the fate of the August draft was unknown. At this point the Company reacted in the most reasonable way possible, by sending Myers a notice stating that the July draft had been dishonored and requesting a replacement.

On August 17, 1972, the Company learned that the August draft had been dishonored. The draft was handled in a routine manner by clerical personnel, and was re-deposited because it had only been dishonored once.

The question thus becomes whether the mere act of sending the draft through for collection a second time can be the basis for liability when the draft dishonored the second time. This precise question was squarely faced in Bigjoe v. Pioneer American Insurance Company, 446 F. 2d. 28 (Ninth Circuit 1971). The Court, basing its decision on both Texas and Washington law, held that even if the re-deposit of a worthless check amounts to a waiver or estoppel, if the check is again dishonored there is a second lapse. Thus the re-deposit can only be a basis for liability if the instrument is actually paid the second time.

In the instant case the August draft was dishonored after the re-deposit, and Myers ignored the August 9 request for a replacement check.

Thus the holding in this case is in conflict with that of the Ninth Circuit in Bigjoe, supra. Furthermore, the result in this case apparently is in conflict with the holding of another panel of this Court in Blanton v. John Hancock Mutual Life Ins. Co., 345 F. Supp. 168, (D.C. Tex. 1971), affirmed 463 F.2d 421 (Fifth Circuit, 1972).

Under the reasoning of the Court in Blanton there would be no recovery in this case even if the August draft had been paid after the re-deposit on August 22, 1972. If the draft had subsequently cleared, that fourteen dollars and eighty cents ($14.80) would have been applied to the delinquent July premium. This would have left the August premium in default, and the grace period would have expired on or about September 2, 1972. As Myers died on September 10, 1972, there would have been no coverage. This result can only have been avoided by Myers' sending a replacement payment pursuant to the notice of August 9, 1972.

III. The Court of Appeals Has Rendered a Decision Which Will Result in a Burden on Interstate Commerce.

It is seriously submitted that the judgment below will lead to confusion in interstate banking transactions at least within the geographic boundaries of the Fifth Circuit. Certainly the rights and liabilities of individuals and commercial establishments cannot rest on the tentative status of accounting entries while checks

and drafts run their natural course through the long distance banking channels necessary to the proper functioning of interstate commerce.

CONCLUSION

Because the resolution of the serious questions raised by the decisions of the courts below is important to the proper functioning of interstate commerce:

We respectfully submit that the Court should grant Petitioner's prayer for a Writ of Certiorari.

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APPENDIX

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NOTE: Appendices B and C, the Insurance Policy, and Check Authorization Agreement, are reproduced in their entirety in the interest of completeness. Petitioner specifically wishes to call the Court's attention to Appendix B pages 11a and 13a, and Appendix C pages 20a and 22a (see underlining on these pages).

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LESLIE KAREN MYERS, INDIVIDUALLY AND AS NEXT FRIEND FOR MICHAEL THOMAS MYERS	I	
VS.	I	CIVIL ACTION NO. A-72-CA-158
KENTUCKY CENTRAL LIFE INSURANCE CO.	I	

MEMORANDUM OPINION AND ORDER

This cause having been presented for trial and heard by the Court, sitting without a jury, the Court now enters this Memorandum Opinion and Order, setting forth its findings of fact and conclusions of law. In this action Plaintiffs seek the proceeds of a life insurance policy issued by Defendant, Kentucky Central Life Insurance Company, on the life of Michael Myers. The policy (Policy No. A622136), issued on May 1, 1972, for insurance in the amount of $14,000, included additional coverage in the amount of $14,000 in the event of the insured's accidental death, and named minor

Plaintiff Michael Thomas Myers as beneficiary. The policy stated that premiums were to be paid annually, but a rider to the policy established a monthly payment procedure whereby the insurance company sent a pre-authorized check for $14.80 to Myers' bank on the first of every month. The premium for May was paid in advance by Myers, and the June draft was duly honored when it reached Myers' bank. The July draft, however, was dishonored by Myers' bank and returned to Defendant marked "insufficient funds." Upon the return of the draft to it, Kentucky Central again submitted the July check to Myers' bank for collection. When the August payment became due, Kentucky Central likewise submitted the August draft to Myers' bank. Subsequently, the July draft was again dishonored by Myers' bank. Upon the second return of Myers' July check, Kentucky Central transmitted a letter to Myers, on August 9, 1972, stating:

> "According to our records, the premium payment due on your above policy has not been received. The grace period provided by the terms of your policy has expired. There-

fore, your Kentucky Central policy with number as shown above has lapsed.

However, by acting promptly you may save this policy and again enjoy its full benefits if you can provide evidence of good health.

A Statement of Health form is enclosed with this letter for your convenience. Just complete this form and return it to us with a deposit of the past due premium as as shown above. Then, if you qualify, your policy benefits will be restored.

Please act now to save this important part of your financial security program. A postage-paid envelope is enclosed for your convenience."

Subsequent to the transmission of this returned check form letter to Myers by Kentucky Central, Myers' pre-authorized check for the August payment was dishonored by Myers' bank and returned to Defendant. Notwithstanding the letter it had sent to Myers on August 9, however, Kentucky Central again, on August 22, deposited the August draft and caused it to be forwarded to Myers' bank for payment. That draft was returned uncollected for the

second time on September 5. On September 10, 1972, Michael Myers was killed in an automobile accident.

Plaintiffs contend that the policy was in full force and effect at least through the month of August, and that the contractual 31-day grace period extended coverage through the month of September, in which Myers was killed. Defendant contends that Myers' policy had lapsed before the date of Myers' death.

The insurance contract involved here provided that,

> "If any premium is not paid when due, such premium is in default and this policy shall become void..... A grace period of thirty-one days, without interest, will be allowed for the payment of every premium after the Initial Premium, during which period this policy shall continue in force."

The rider to the policy established monthly pre-authorized checks as the method of premium payment, and stated that

> "...no premium or portion thereof

shall be deemed to have been paid unless and until Kentucky Central received actual payment at its Home Office."

Thus, the insurance company clearly could have cancelled Myers' policy. The question is whether Kentucky Central actually did cancel the policy, or if it accepted the July and August pre-authorized checks in payment for the premiums for those months. The situation is complicated by the accounting procedures utilized by Kentucky Central. The company maintained two separate accounts and accompanying sets of books - - a General Premium Account, and a "bad check account." When they became due, Myers' pre-authorized checks were deposited, along with the premium payments from other policyholders. At the time of Myers' death, Kentucky Central's General Premium Account showed that Myers' August premium had been paid. In reality, when the July and August pre-authorized checks were returned because of insufficient funds in Myers' account, those drafts were purchased by the insurance company's "bad check account," which was used to purchase

dishonored drafts from the company and act as a kind of "collection agency" for collection on those bad checks. Thus , the insurance company retained the dishonored drafts, and at the time of Myers' death he owed the company $29.60.

We find that Defendant accepted the July and August pre-authorized checks as payment of those months' premiums, and accordingly conclude that Policy No. A622136, issued by Kentucky Central Life Insurance Company on the life of Michael Myers, was in full force and effect at the time of Michael Myers' death. We recognize the general Texas rules of insurance law that forfeiture of the benefits of an insurance policy may be, when contractually stipulated, self-executing upon non-payment of premiums, General American Life Insurance Co. v. Rios, 139 Tex. 554, 164 S.W.2d 521 (1942); that an insurance company need not advise the policyholder that his policy has lapsed, Cantu v. Southern Life & Health Insurance Company, 360 S.W. 2d 812 (Tex. Civ. App. - - San Antonio 1962, no writ); and that the crediting of a premium payment on the company's books does not mean

that the company must unconditionally consider the premium paid, National Aid Ass'n v. Horne, 137 Tex. 597, 155 S.W.2d 910 (1941); Texas Mut. Life Ins. Ass'n v. Tolbert, 134 Tex. 419, 136 S.W.2d 584 (1940).

Nonetheless, equally well-settled principles of Texas law require our conclusion that, under the facts presented in this case, Kentucky Central accepted the dishonored July and August drafts as payment of the policy premiums for those months. A check, even though previously dishonored, constitutes an enforceable obligation which may be collected "by suit or by any other method recognized by law." Texas Mut. Life Ins. Ass'n v. Love, 66 S.W.2d 424, 426 (Tex. Civ. App. - - Beaumont 1933, writ dism'd); see also Harris v. Glen Falls Group, 478 S.W.2d 561 (Tex. Civ. App. -- Corpus Christi 1972, writ ref'd n.r.e.). Retention of a previously dishonored draft by the insurance company may constitue acceptance of the draft in payment of the premium, absent a showing of fraud on the part of the maker of the check. See Harris v. Glen Falls Group, supra; Pardee v. Universal Life Insurance Co. 170 S.W.2d 852 (Tex. Civ. App. -- Waco 1943, no

writ); Texas Mut. Life Ins. Ass'n v. Love, supra. In the present case there has been no allegation of fraud on the part of the insured. Kentucky Central must, by its conduct and treatment of the July and August pre-authorized checks, be deemed to have accepted them in payment of those month's premiums. Kentucky Central retained the drafts, gave no indication that it did not intend to attempt to collect on the checks, and actually did continue its efforts to collect on the August draft well after transmitting to the insured its returned check form letter reciting that his policy had lapsed.

Kentucky Central cannot have it both ways. It cannot be allowed to assert retroactively that Myers' policy lapsed with non-payment of the July premium, while it continued its efforts to collect on the August draft through the month of August. We conclude that the policy must be deemed to have been within the 31-day contractual grace period, and thus in full force and effect, at the time of Michael Myers' death. It is accordingly

ORDERED, ADJUDGED and DECREED that Plaintiff,

Michael Thomas Myers, by and through his next friend Leslie Karen Myers, have and recover of and from Defendant, Kentucky Central Life Insurance Company, the sum of $35,740.00, said sum being the total amount of damages stipulated by the parties in the even of a finding of Defendant's liability. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered the 25th day of June, 1974, at Austin, Texas.

/S/ Jack Roberts
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 74-3079
Summary Calendar*

LESLIE KAREN MYERS, Individually and as next friend for MICHAEL MYERS, a minor,

Plaintiff-Appellee,

versus

KENTUCKY CENTRAL LIFE INSURANCE CO.

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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(January 5, 1975)

Before BELL, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130

February 6, 1975

TO ALL COUNSEL OF RECORD

No. 74-3079 - Myers v. Kentucky Central
Life Insurance Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,
EDWARD W. WADSWORTH
CLERK

By /S/ Arne G. Parent
Deputy Clerk

cc: Mr. Thomas S. Goggan
Mr. Dudley D. McCalla
Mr. Bob Roberts

APPENDIX B

GENERAL CONDITIONS, PROVISIONS AND BENEFITS

1 - The Contract. This policy and the application, a copy of which is attached hereto and made a part hereof, constitute the entire contract between the parties hereto. All statements made by the insured and by the applicant if other than the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim hereunder unless it is contained in the application for this policy.

2 - Modifications. Only the President or the Secretary of the Company has the authority to change, modify, alter, or waive any of the terms, conditions, or provisions of this policy.* The Company shall not be bound by any promise or representation heretofore or hereafter made by any agent or person unless made in writing by one of said officers.

3 - Owner, Beneficiary. The designations of Owner and of Beneficiary on the first

page of the policy will remain in effect until changed by the Owner. The Beneficiary at the insured's death will be as provided in the beneficiary designation then in effect. If no beneficiary designation is then in effect or if there is no designated beneficiary then living, the Owner will be the Beneficiary, and in this case if the Insured is the Owner, the Insured's estate will be the Beneficiary. The Owner shall have the sole and absolute power to exercise all rights and privileges without the consent of any other person unless the Owner provides otherwise by written notice. Changes in designations of the Owner and of the Beneficiary may be made during the lifetime of the insured by written notice to the Company at its Home Office. A new designation will take effect as of the date the notice is signed if the Company acknowledges receipt in writing on the notice, whether or not the Insured or Owner is alive at the time of the acknowledgment, subject to the rights of any assignee of record with the Company, and subject to any payment made or other action taken by the Company before the acknowledgment.

4 - Premium Payments. Premiums are due and payable in advance at the Home Office of the Company or to an authorized agent of the Company in exchange for the Company's receipt signed by its President or Secretary and countersigned by such agent or other duly authorized person. If any premium is not paid when due, such premium is in default and this policy shall become void except as otherwise provided herein. The frequency of premium payment may be changed as of any policy anniversary upon written request to the Company's Home Office. Change may be made to annual, semi-annual, quarterly, or monthly payments at the Company's published rates in effect on the Date of Issue, provided that, without the Company's consent, no semi-annual, quarterly, or monthly payment shall be less than $10.00. The payment of any premium shall not continue this policy in force beyond the date when the next preium is due.

5 - Grace Period. A grace period of thirty-one days, without interest, will be allowed for the payment of every premium after the Initial Premium, during which period this policy shall continue in force. If the

Insured dies within a grace period, any premium then due and unpaid will be deducted from the amount payable hereunder.

6 - Premium Refund At Death. That portion of any premium paid which applies to a period beyond the policy month in which the Insured died shall be refunded as part of the proceeds of this policy.

7 - Reinstatement. This policy, unless surrendered for its cash value, may be reinstated at any time within three years after date of default in payment of premium upon presentation of evidence of insurability satisfactory to the Company, the payment or reinstatement of any indebtedness at date of default, the payment of all premiums in default, and the payment of interest at 5% per annum, compounded annually, on such indebtedness and on each premium in default from its due date.

8 - Incontestability. This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its Date of Issue, except for non-payment of premiums, and except with respect to any Rider granting

benefits in event of total disability, additional indemnity in event of accidental death, or additional indemnity in event of accidental loss of life, eyesight or limb.

9 - Misstatement Of Age. If the age of the Insured has been misstated, any amount payable hereunder or any benefit accruing hereunder shall be adjusted to that which the premiums paid would have purchased at the correct age.

10 - Suicide. If the Insured, whether sane or insane, shall commit suicide within two years after the Date of Issue, the liability of the Company under this policy shall be limited to the premiums paid hereon.

11 - Assignment. No assignment of this policy shall be binding on the Company until it is filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment. The amount of any loan granted through operation of the Automatic Premium Loan Option Provision, together with interest thereon, shall become a first lien upon this policy in the Company's favor in priority to the claims of any assignee or of any other person.

12 - Policy Settlement. Any amounts payable by the Company under this policy shall be payable at its Home Office, and shall be payable in one sum unless otherwise provided herein or agreed to by the Company. As a condition to any settlement, the Company may require the legal surrender of the policy. Prior to any settlement as a death claim, the Company will require that due proof of the Insured's death be submitted at its Home Office on forms furnished by the Company.

13 - Policy Loans. While this policy is in force, except as extended term insurance, the Company will lend on proper assignment of this policy and on the sole security thereof a sum which, with any existing indebtedness and any premium then due and unpaid, will not exceed the cash value at the next premium due date (or at the end of the current policy year for a paid-up policy). Interest in advance at an effective rate of 5% per annum to the end of the current policy year will be deducted from the proceeds of the loan. Interest at the same rate will be due and payable annually in advance thereafter and, if not so paid, will be added to

the principal and bear the same rate of interest. The Company may defer the granting of any loan, other than to pay premiums on its policies, for the period permitted by the law of the state in which this policy is delivered, but not exceeding six months from the date the written application therefor is filed at the Home Office of the Company.

14 - Automatic Premium Loan Option. The Automatic Premium Loan Option until revoked shall be in effect if requested in the application for the policy, or if a subsequent written request is received by the Company at its Home Office before any premium is in default beyond the grace period. While this option is in effect, each premium becoming due and not otherwise paid by the last day of grace will be automatically paid by the Company and charged as a loan against the policy with interest in advance at an effective rate of 5% per annum from the due date of the unpaid premium to the end of the policy year. However, such a premium will not be paid under this option if (1) it is the first premium due next following a policy

year for which all premiums have been paid under this option, or (2) the loan value of the policy, as of the date to which premiums would be paid by such loan, is less than the amount of the entire unpaid premium, with interest as above provided, plus any existing indebtedness, and in either event, the non-forfeiture provisions shall apply. Such loan will be subject to the "Policy Loans" provisions, except that the policy will be considered to have been automatically assigned to the Company to secure such loan. If premiums are payable more frequently than annually and if a premium due on any policy anniversary is to be paid by Automatic Premium Loan after the last premium has been paid in the same manner, the Company shall change the mode of premium payment to annual, providing the loan value of the policy is sufficient, according to these rules, to pay an annual premium. This option may be revoked at any time with respect to any unpaid premium then due and to premiums subsequently due, upon written notice received by the Company at its Home Office.

15 - Indebtedness. Any indebtedness to the

Company on or secured by this policy shall be deducted in any settlement hereunder or shall be applied in the manner provided in this policy to modify any non-forfeiture value. The whole or any part of any indebtedness may be repaid at any time prior to the maturity of this policy and prior to the expiration of the grace period for any premium. Whenever the total indebtedness shall equal or exceed the full amount available as a loan, this policy shall terminate but in no event until thirty-one days after notice shall have been mailed to the last known address of the Owner and of any assignee of record. The term "indebtedness" as used in this policy means indebtedness to the Company on this policy.

*NOTE - Emphasis added.

APPENDIX C

To: Kentucky Central Life Insurance Company
Lexington, Kentucky

As a convenience to me, I hereby request and authorize you to draw check on by bank checking account maintained at the bank named on the reverse side for the payment to Kentucky Central Life Insurance Company (Kentucky Central) of premiums due on the insurance policy on the reverse side.

It is agreed that:

(1) A check shall be drawn each month on or about the premium due date of the policy. It will not be necessary for any officer or employee of Kentucky Central to sign such checks.

(2) Kentucky Central shall incur no liability by reason of the dishonor of any such checks.

(3) Any requirement for giving notice of premiums due shall be waived as long as this Automatic Bank Check Plan is in effect. The cancelled check will constitute a receipt for the premium, but no premium or portion thereof shall be

deemed to have been paid unless and until Kentucky Central receives actual payment at its Home Office. The use of this Plan shall in no way alter or amend the provisions of the policy with respect to the termination of such policy upon nonpayment of the premium due.

(4) If this authorization pertains to a policy for this application is pending, it shall not become effective unless and until such policy is issued and delivered and shall relate only to premiums thereafter falling due.

(5) If this authorization pertains to a policy previously issued on which the mode of premium payment is now other than monthly, this shall constitute an election to alter such mode to a monthly basis.

(6) This authorization does not cover repayment of any policy loan or payment of interest thereon. Such interest, if any, shall be due and payable annually on the policy anniversary.

(7) During the continuance of this Plan any dividend which in the absence of this

of this authorization would be applied in reduction of premium shall instead be paid in cash.

(8) This Plan shall continue in effect unless and until terminated by Kentucky Central or me by thirty (30) days written notice to the other party. In addition Kentucky Central may terminate the Plan immediately if any check is not paid upon presentation.

_____ _____

Date Completed Signature of Depositor as it Appears on Bank Records

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AUTHORIZATION TO HONOR CHECKS DRAWN BY AND PAYABLE TO THE KENTUCKY CENTRAL LIFE INSURANCE COMPANY, LEXINGTON, KENTUCKY

TO: _____Bank

Branch Name and Number or Letter, if any __

_____

Bank Address_____

As a convenience to me, I hereby request and authorize you to pay and charge to my bank checking account checks drawn by and payable to the order of the Kentucky Central Life Insurance Company, Lexington, Kentucky, pro-

vided there are sufficient collected funds in said account to pay the same upon presentation. It will not be necessary for any officer or employee Of the Kentucky Central Life Insurance Company to sign such checks. I agree that your rights in respect to each such check shall be the same as if it were a check drawn on you and signed personally by me. This authority is to remain in effect until revoked by me in writing, and until you actually receive such notice I agree that you shall be fully protected in honoring any such check.

I further agree that if any such check be dishonored, whether with or without cause and whether intentionally or inadvertently, you shall be under no liability whatsoever even though such dishonor results in the forfeiture of insurance.

_____ _____ _____

Date Bank Account Bank Signature of Depositor

PLEASE NOTE: The size of this form is adjustable from a 6 x 4 to a 5 x 3 card for your filing convenience. There is an indemnification Agreement on the reverse side.

DL-331A (5-69)

APPENDIX D

Note: Please see copy of Notice of Unpaid Check on next page.

DATE: August 9, 1972

NOTICE OF UNPAID CHECK

The bank has returned your check unpaid. The notation placed on the check by the bank was ☒ Insufficient funds ☐ Other

☒ Please send your remittance as soon as possible.

☐ To keep your valuable protection in force, we are redepositing your check as of this date. If not honored within the grace period(s) of the policy(s), the policy(s) will lapse.

If your returned check was not redeposited, it was paid by preauthorized check or post dated check and further checks will be processed until the item has been paid. Please act promptly and remit the amount shown below.

PAY THIS AMOUNT	NO. MOS.
$14.80	1

AMOUNT OF CHECK
$14.80

	Policy No.(s)	Payment Due Date	Grace Period Expiring
Michael Myers	09-1692136	07/01/72	08/01/72
531 West Hopkins			
San Marcos, Texas 78666 033			

YOUR KEY TO FAMILY SECURITY, COAST TO COAST

KENTUCKY CENTRAL LIFE INSURANCE CO
200 EAST MAIN STREET
LEXINGTON, KENTUCKY 40507

BEST COPY AVAILABLE

APPENDIX E

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LESLIE KAREN MYERS, INDIVIDUALLY AND AS NEXT FRIEND FOR MICHAEL THOMAS MYERS, A MINOR	§	
	§	CIVIL ACTION
VS.	§	NO. A-72-CA-158
KENTUCKY CENTRAL LIFE INSURANCE COMPANY	§	

STIPULATION OF TRANSACTIONS

April 11, 1972. Michael Myers application received and recorded.

April 12, 1972. May premium paid by personal check with application.

May 1, 1972. Policy issued.

June 3, 1972. June preauthorized check deposited to home office bank account and credit for $14.80 to Premium Income Account.

July 3, 1972. July preauthorized check deposited to home office bank account and credit for $14.80 to Premium Income Account.

July 18, 1972. (These transactions, although recorded in the Company's General Ledger, are not reflected in the Computer Accounting System. The information was taken from date stamps on the reverse of the preauthorized check returned dishonored.) The July 3, 1972, preauthorized check was returned dishonored the first time to Central Bank and Trust Company and one day later, upon bank notification to the Company, was purchased back by Kentucky Central. The Accounting Division drew a check on the Home Office bank account payable to Central Bank and Trust Company. The entry for the repurchase of the preauthorized check was a debit of $14.80 to Account No. 22050, Returned Check Clearing Account. The dishonored, preauthorized check was returned to the Accounting Division, and after inspection of the date stamps and possible attached routing slips from the Federal Reserve Bank, it was determined that it had never been dishonored before. The preauthorized check was deposited to our Home Office bank account

with an entry made by the cashier as a debit to the Home Office bank account and a credit to the Returned Check Clearing Account, No. 22050. The redeposited check was then routed to Central Bank, which handled the check on July 24, 1972, routing the check to the payor's bank in San Marcos for payment.

August 2, 1972. August preauthorized check deposited to home office bank account and credit for $14.80 to Premium Income Account.

August 7, 1972. (The following transaction, although recorded in the Company's General Ledger, is not reflected in the Computer Accounting System. Information was taken from the date stamp on the reverse of the preauthorized check returned dishonored.) The July 3, 1972, preauthorized check was returned to our bank a second time and again repurchased by the Company by drawing a check on the Home Office bank account payable to the Central Bank and Trust Company. The dishonored, preauthorized check was returned to the Home Office Accounting

Division a second time. It was then determined that it was not eligible for redeposit. Notification was given to the payor and agent by mailing a Returned Check form letter on or about August 9.

August 12, 1972. The August 7, 1972 debit to Returned Check Clearing Account, No. 22050, was then reversed by crediting the Returned Check Clearing Account for $14.80 and debiting the Returned Check Account, No. 22054, for $14.80.

(The following account transaction, although recorded in the Company's General Ledger, is not reflected in the Computer Accounting System. Information was taken from the date stamp on the dishonored, preauthorized check.) The preauthorized check, dated August 2, 1972, was returned dishonored for the first time to Central Bank on approximately August 17, 1972. It was repurchased by the Home Office by drawing a check on the Home Office account payable to Central Bank and Trust Company. This entry debited the Clearing Account, No. 22050, for the returned item. After it was determined that the preauthorized

check had been deposited once, it was redeposited and forwarded on August 22, 1972, by Central Bank to the payor's bank for payment.

September 5, 1972. (The following account transaction, although recorded in the Company's General Ledger, is not reflected in the Computer Accounting System.) The August 2, 1972, preauthorized check was returned to Central Bank a second time. It was again repurchased by issuing a check from the Home Office bank account payable to Central Bank, debiting Account No. 22050, Returned Check Clearing Account.

September 11, 1972. The September 5, 1972 debit made to Returned Check Clearing Account, No. 22050, was reversed by crediting Account No. 22050 for $14.80 and debiting the Returned Check Account, No. 22054, for $14.80.

September 16, 1972. The two returned check items of $14.80 each previously debited to Account No. 22054 and the two entries of $14.80 each were reversed by debiting the Premium Income Account. Thus, the records of the Company reflected

that the premiums paid by checks not dishonored paid the premium up to July 1, 1972.

No premium other than those described in the transactions above were received on this policy.

Respectfully submitted,

BYRD, DAVIS, EISENBERG & CLARK
Bob Roberts
214 Austin National Bank Bldg.
Austin, Texas 78701

By /S/ Bob Roberts

ATTORNEYS FOR PLAINTIFFS

HEATH, DAVIS & McCALLA
Dudley D. McCalla
200 Perry-Brooks Bldg.
Austin, Texas 78701

By /S/ Thomas Goggan

ATTORNEYS FOR DEFENDANT

beneficiary the face amount of the policy plus an equal amount for accidental death benefits plus penalty, interest and attorney's fees as provided under Texas law.

B. By Defendant. Defendant contends that by virtue of non-payment of premium the policy had lapsed prior to the death of Michael Myers, deceased, and therefore defendant owes nothing to said beneficiary.

IV. Contested issues of fact.

A. Whether or not any notice in the form of Exhibit 3 noted below was ever mailed to the insured.

B. Whether or not any notice in the form of Exhibit 3 noted below was ever delivered to 531 West Hopkins in San Marcos, Texas.

V. List of Exhibits:

Exhibit No. 1. Letter from Kentucky Central Life Insurance Company.
Exhibit No. 2. Request for pre-authorized check plan.
Exhibit No. 3. Notice of unpaid check.
Exhibit No. 4. Premium breakdown.
Exhibit No. 5. New business input.
Exhibit No. 6. Form H-O-134-REV. 2-68.

Exhibit No. 7. Pre-authorized check endorsement.
Exhibit No. 8. Specification page.
Exhibit No. 9. Form dated April 12, 1972.
Exhibit No. 10. Drafts dated 8-2-72 and 7-3-72.
Exhibit No. 11. Copy of request for pre-authorized check plan.
Exhibit No. 12. Statement explaining Exhibit No. 4.
Exhibit No. 13. Original policy of insurance issued Policy No. AG22136.
Exhibit No. 14. Copy of letter from Bob Roberts constituting demand upon defendant for payment of full proceeds of the policy.

VI. Contested Issues of Law.

A. Whether notice of dishonor of check must be received by the decedent as a prerequisite to lapse of the policy.

B. Whether defendant is estopped to assert lapse of said policy because defendant did not obtain payment of the premium by pre-authorized check or notify the insured that defendant would not continue to obtain payment by pre-authorized check and further

notify insured as to the amount of annual premium due at time defendant no longer would obtain payment by pre-authorized check. (this is plaintiff's statement of its estoppel theory.)

C. Whether dishonor of a pre-authorized check causes reversion of the premium paying period to an annual period and that defendant is then required to inform the decedent of some amount of partial annual premium then allegedly due.

D. Whether the internal accounting procedures of the defendant effected the payment of the premiums due on or about July 2 and August 2, 1972.

VII. List of witnesses to be called by each party.

A. By Plaintiff:

(1) Hugh L. Stewart

(2) Leslie Karen Myers

(3) Bill Germer

B. By Defendant:

(1) Don Raines

(2) Hugh L. Stewart

(3) Mrs. Bill Germer